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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 113

CHICAGO PNEUMATIC TOOL COMPANY,

Petitioner,

vs.

HUGHES TOOL COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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The Scheffer Press, Inc.—FInancial 6-2694

INDEX.

	PAGE
Opinions Below	1
The Questions Presented	1
Statement of the Case	2
Argument	5
Conclusion	8

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Opinions Below.

The District Court filed no opinion, the reasons for the granting of the injunction appearing in the injunction order itself (R. 62-63)*, and in the transcript of the hearing in the District Court (R. 92-96). The opinion of the Court of Appeals for the Tenth Circuit (R. 209-216) is reported at 180 F. (2d) 77 and 84 USPQ 213.

The Questions Presented.

The three questions said to be presented by the Petitioner (p. 5) do not arise from the record, as will more fully appear from the Statement of the Case and Argument herein. In each "question" the Petitioner has incorporated one or more factual assertions, not supported by the record, and rejected by the Court of Appeals.

* The following line appears to be omitted from the bottom of page 62 of the Record: "19, 1947 by the filing of a complaint herein charging de-".

The only legal question arising on the record was stated by the Court of Appeals (R. 215):

> "A Federal District Court which first obtains jurisdiction of parties and issues may preserve its jurisdiction by enjoining proceedings involving the same issues and parties, begun thereafter in another Federal District Court."

Statement of the Case.

On July 19, 1947, the complaint herein was filed charging Petitioner with infringement of four patents relating to rock bits used in rotary drilling for oil and gas (R. 1, 4).

On January 13, 1948, the Petitioner answered and filed a counterclaim for patent infringement (R. 5, 16). Among other defenses which the Petitioner then urged be *adjudicated in the present case* was an alleged estoppel said to arise from Respondent's having urged dismissal when a declaratory judgment action was filed by Petitioner and its parent company in 1944 (R. 14-15).

On April 12, 1948, the Petitioner amended its counterclaim to include charges of infringement of five additional patents (R. 17-19).

On October 28, 1948, the Petitioner filed a motion to transfer this case to Delaware, under Title 28 U. S. Code, Sec. 1404(a)*.

The Respondent opposed the motion on the ground that since the present case could not have been filed in Delaware for non-jurisdictional reasons it could not be transferred there, and that since there was no rotary drilling in or near Delaware, and most witnesses would come from the

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* "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

West or Southwest "the convenience of parties and witnesses" would not be served by a transfer (R. 54-59, 96-108). The motion to transfer was denied on March 18, 1949 (R. 35-36).

On April 16, 1949, after the present case had been set for trial, to commence on June 13, 1949, Petitioner filed a declaratory judgment action in Delaware asking adjudication of the matters already at issue in the present case and asking that prosecution of the present case be enjoined (R. 39).

On May 6, 1949, the District Court entered an order herein enjoining the prosecution of the subsequently filed Delaware suit or any other action involving the same subject matter until termination of the present case (R. 62-63). The present appeal is from this injunction and the failure to modify it (R. 206).

The 1944 Delaware proceedings, upon the basis of which Petitioner urges an estoppel, are not accurately or adequately summarized in the Petition (pp. 2-3). The 1944 complaint appears in the record at pages 166 to 192. Counts 1 and 2 (R. 166-184) sought to have the Delaware court readjudicate a previous decision by the District Court of Oklahoma and the Court of Appeals for the Tenth Circuit and enjoin further proceedings on the accounting. Count 3 (R. 184-192) alleged notices of infringement in 1935 and 1939 with respect to discontinued structures and vaguely alleged an "omnibus charge" of patent infringement in 1942. Count 3 asked for a declaratory judgment that no bits made or sold by Petitioner or its parent corporation since 1934 infringed any patents of Respondent (including the previously adjudicated patent).

The Respondent moved to dismiss each of the three counts of the complaint in the 1944 Delaware case. The first two counts were dismissed on the ground that the

Oklahoma court had first acquired, and still retained, jurisdiction of the subject matter (61 F. Supp. 767, 770-771). The third count was fatally defective in failing to properly allege any charge of infringement against Petitioner's or its parent corporation's then current devices, and in failing to allege any substantial sales except sales to the Government, which could not be adjudicated by the Delaware court but only by the Court of Claims. It was dismissed on these grounds (61 F. Supp. 767, 771-772).

The Petition for Certiorari states as a fact (p. 2) that Petitioner had been charged with patent infringement in 1942. The District Court for the District of Delaware found to the contrary (61 F. Supp. 767, 772).

The Petition for Certiorari further is predicated upon the assertion that in the 1944 Delaware proceedings, the Respondent asserted and represented that there was "no controversy" between the parties (Petition, p. 3). It is to be observed that each of "The Questions Presented" also incorporates an alleged assertion by Respondent that there was "no controversy" (Petition, p. 5). In the 1944 Delaware proceedings, the Respondent, on its motion to dismiss, argued as to the sufficiency of the complaint, and its motion was directed to the failure of that complaint to allege a controversy. There had been no charge of infringement of any then current bit, and the only substantial current sales alleged were to the government, which could not be adjudicated in that case, but only in the Court of Claims.

ARGUMENT.

The brief in support of the petition presents two alleged points. Neither is well taken.

Point I of the brief in support of the petition (pp. 8-12) urges that there is some important question of Federal law which has not been, but should be, settled by this Court. What the important question is does not clearly appear. The argument consists principally of vague, incendiary charges that Respondent has devised some "scheme" to restrict litigation to a single circuit, and reference is made to cases in which there was concentration of an industry in a particular circuit. No problem of concentration of an industry in a single circuit is involved. The brief in support of the petition calls attention to various adjudications of Respondent's patents in both the Fifth and the Tenth Circuits, and the Record shows that rotary drilling is carried on in most circuits—the Third Circuit to which Petitioner now seeks transfer being one of the few circuits in which there is no rotary drilling (R. 99-103).

At pages 10 to 12, the brief for Petitioner calls attention to what is termed "a glaring example of what can be done to avoid conflict between circuits". The "glaring example" is said to consist in Respondent's action in a case in the Fifth Circuit in withdrawing the Fletcher patent No. 1,856,-627 on appeal "rather than risk a decision on its validity by the Fifth Circuit Court of Appeals". As authority for this statement, the Petitioner refers to 176 F. (2d) 783, at p. 792. At that page of the report, the Court of Appeals for the Fifth Circuit pointed out that pending that appeal, the Fletcher patent had expired, and it was dropped in oral argument "since there was no award of damages for in-

fringement". The patent was not withdrawn from that case and it was argued in the briefs. The patent expired before oral argument, and the issues as to that patent then being moot so far as that case was concerned, counsel for Respondent did not discuss it in oral argument. The original opinion of the Court of Appeals for the Fifth Circuit (82 U.S.P.Q. 339) affirmed the trial court, but after Petition for Rehearing, the order was modified to expressly state that the issues as to the Fletcher patent having become moot, the judgment would be reversed as to that patent.

The Petitioner concludes its first point by urging that this Court should declare that one who threatens suit and retracts his charge of infringement to secure dismissal of a declaratory judgment suit, will be held to his retraction. As pointed out above, there was no charge of infringement as to the devices Petitioner or its parent was making and selling to the Government in 1944, and there was no retraction. In the 1944 Delaware case, Respondent merely urged that the complaint by Petitioner and its parent did not state a cause of action. The District Court and the Court of Appeals for the Third Circuit agreed (61 F. Supp. 767 (D.C. Del., 1945), affirmed 156 F. (2d) 981 (C.C.A. 3, 1946)). Moreover, the Court below has not ruled that if there is a retraction of a charge of infringement, the patent owner should not be held to it. The effect of the decision below is to hold that the matter should properly be tried in the present case where Petitioner first raised the issue and asked for an adjudication with respect to it.

The second point of the Petitioner (Brief, pp. 12-16) is that the decision below conflicts with repeated adjudications in various circuits that a first filed suit should take precedence over a subsequent suit on the same issues. Petitioner states (p. 14):

> "The decision below is in direct conflict with these cases although the conflict is not recognized, and none of the cases is cited in the Court's opinion."

The Petitioner errs. The Court of Appeals (R. 215) stated the legal principle which it applied in the following language:

> "A Federal District Court which first obtains jurisdiction of parties and issues, may preserve its jurisdiction by enjoining proceedings involving the same issues and parties, begun thereafter in another Federal District Court."

Among the cases cited by the Court of Appeals are two of those relied upon by Petitioner. It thus appears that the Court below recognized and applied the rule established by the very cases with which Petitioner alleges a conflict.

Petitioner now contends that there is a dispute about, and conflict of decisions on, a rule of law; but in the District Court, Petitioner's counsel expressly agreed with the legal rule urged by Respondent (and applied by the Court) and stated the issue to be merely the **application** of the rule to the particular facts of this case (R. 93).

The complaint filed in 1944 by Petitioner and its parent corporation was dismissed. It did not state a cause of action which the Delaware Court would adjudicate. That Court properly declined to take jurisdiction to declare rights as to structures being sold by Petitioner's parent corporation to the Government, which structures had never been charged by Respondent to infringe. After that suit had terminated, the Respondent in 1947 filed the present suit charging infringement by Petitioner's sales to private parties. Petitioner answered in January, 1948, alleging that Respondent's arguments as to Petitioner's parent corporation's sales to the Government constituted a bar to the action against Petitioner for its sales to others. Petitioner asked the Oklahoma Court to decide this question. Then in April, 1949, after the present case was set for trial,

Petitioner filed a new suit in Delaware raising the same issues as the present case, *i.e.*, Petitioner's right to sell to private parties. Petitioner was properly enjoined from prosecuting that case or any other involving the issues of the present case.

The Petitioner argues (pp. 14-16) that the fact that in 1947 the present suit was filed shows that there was a "controversy" between the parties in 1944. This does not follow. Moreover, the question at issue in the 1944 Delaware case was whether a justiciable controversy was alleged. Even if Petitioner were correct in stating that in 1944 there was, in fact, a "controversy" within the requirements of the declaratory judgment act (and Petitioner errs in this), the Petitioner and its parent corporation drew the complaint and would be chargeable with its adjudicated insufficiency. The action of Respondent in moving to dismiss because of the insufficient complaint was proper.

CONCLUSION.

As stated by Petitioner's counsel to the District Court, there is no dispute as to the law. The issues are merely as to the applicability to the particular facts.

No conflict of decision appears. The Court of Appeals applied the very line of cases to which Petitioner refers in urging a conflict.

It is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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vs.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Facts.

Hughes refers in its Statement of the Case to Counts 1 and 2 of the first Delaware complaint, No. 463. Those counts have nothing whatever to do with the present action.

Hughes challenges the accuracy of our statement with respect to the 1944 Delaware proceedings (No. 463) that Judge LEAHY dismissed that action on Hughes' representation that there was no controversy between the parties. Hughes asserts repeatedly in its brief that count 3 was defective in failing properly to allege any charge of infringement and that its motion to "dismiss" (actually a motion for summary judgment because supported by affidavit) was

directed to the failure of that complaint to allege a controversy.

Judge LEAHY expressly stated the contrary. In his opinion, 61 Fed. Supp. 767, he said in footnote 16 at page 771:

> "For the purpose of this case, then, the objections to the pleadings in all three counts are rejected."

and in the last paragraph of his opinion, on page 772, he said:

> "Aside from the portions pertaining to pleading deficiencies, defendant's motion challenging plaintiff's right to maintain the present action should be granted."

The first Delaware complaint (No. 463) therefore was expressly held by Judge LEAHY to contain no deficiency in pleading the existence of a controversy in count 3.

The Tenth Circuit Court of Appeals wrote an opinion in which it made the error of fact which Hughes repeats. This entire case was presented on written documents without oral testimony, so this Court may consider the actual facts even though this error was made by the Court below. The District Judge wrote no opinion and made no findings of fact (despite Rule 52(a) F. R. C. P.).

That Judge LEAHY's decision granting summary judgment was based upon extraneous facts introduced by affidavit also appears clearly from his repeated mention of facts which were not in the pleadings.

For example, the complaint in the 1944 Delaware case (No. 463) unequivocally alleged that there was an "omnibus charge" of infringement in 1942 (R. 189, Par. 45). Judge LEAHY found at page 772 that that charge was made in a letter written by Hughes' attorney in connection with

litigation, which he termed "lawyers' chess". The complaint did not mention such a letter or state any circumstances surrounding the charge. Those were introduced into the case by affidavit in support of Hughes' motion for summary judgment. Obviously, Judge LEAHY took cognizance of such extraneous facts, and did not dismiss count 3 on the pleadings.

Indeed, Hughes did not even make a motion in the 1944 Delaware case (No. 463) to dismiss count 3 for failure to state a cause of action under the patent laws, the only cause of action for which relief was asked in count 3. This is shown conclusively by the motion itself, the pertinent portion of which is reproduced in the Appendix hereto.

This case does not depend upon an examination of detailed facts. The facts are straightforward and simple and the salient facts are these:

1. In 1933, before the advent of the Type G bit, Hughes sued Pneumatic (Mass.) for infringement of patent No. 1,647,753 (R. 136, 168). This litigation was terminated by a settlement in 1946 during accounting proceedings (R. 136) after the patent had been held valid and infringed by Judge VAUGHT in an unreported opinion affirmed by the Tenth Circuit Court of Appeals at 97 F. (2d) 945 on July 1, 1938.

2. In April, 1935, when the Type G bit was being made, Hughes notified Chicago Pneumatic of infringement of patents 1,983,283 and 1,983,316 (R. 27, No. 5).

3. In January, 1939, when the Type K bit was being made and Types G and K were being marketed, Hughes notified Chicago Pneumatic of infringement of patents 1,856,627 and 1,983,316 (R. 27, No. 6).

4. In the latter part of 1942, when the Type K bit was being made, Hughes made an omnibus charge of infringe-

ment against Chicago Pneumatic (which Judge LEAHY called "lawyer's chess"), without specifying any particular patents (R. 189; 61 F. Supp. 771, Footnote 14).

5. On July 20, 1944, while the Type K bit was still the principal bit being marketed to private industry (R. 25-26, No. 4), Type E bits were available to the public, and Hughes leased one Type E bit from Pneumatic (N. J.) at Clay City, Illinois; and on August 11, 1944 Hughes leased another Type E bit from Chicago (N. J.) in Clay City, Illinois (R. 27, No. 7; R. 30, Ex. 1).

6. On August 22, 1944, the local manager of the Oklahoma City office of Hughes attempted to purchase a third Type E bit from Chicago Pneumatic in Oklahoma City, Oklahoma; on being told that arrangements could be made for delivery in Clay City, Illinois but not in Oklahoma or Kansas, he rejected the proposal with the explanation that he (Hughes' local manager) was under instructions from Hughes' Houston office to procure the bit from Chicago Pneumatic in the Tenth Circuit (R. 27, No. 8).

7. On August 24, 1944 both Chicago Pneumatic companies filed the first Delaware action against Hughes No. 463, asking for declaratory judgment of invalidity of the following four patents:

Fletcher	No. 1,856,627
Scott & Garfield	No. 1,983,316
Scott	No. 2,011,084
Garfield & Scott	No. 2,030,442

or any other patent owned by Hughes which might be asserted against Chicago Pneumatic's bits, and non-infringement thereof by Chicago Pneumatic's Types G, K and E bits (R. 27, No. 9; R. 165, Ex. 8; R. 193, 195, 197).

8. Hughes moved to dismiss that suit, No. 463, on the ground that there was no existing controversy between the parties. Judge LEAHY granted that motion, expressly refusing to dismiss on the pleadings (pp. 2-3 above), and expressly holding that there was no controversy in fact, although expressly recognizing that a controversy had been alleged in the pleadings. He said at the top of page 772:

> "The substantive question raised by count 3 (now that the Anti-Trust Laws issue has been abandoned) is whether the count should be dismissed for failure of an actual controversy between the parties, for the statute is available only in those cases involving an actual controversy. Coffman v. Breeze Corporation, 323 U. S. 316, 324, 65 S. Ct. 298, and cases cited."

9. The renunciation of a controversy by Hughes was unequivocal. It was expressed in Hughes' brief before Judge LEAHY in the following words (R. 29):

> "This, at the very most shows that there was once a controversy which, but for plaintiff's present attempted resurrection, would have remained dead and buried."

10. After Judge LEAHY was affirmed on August 26, 1946 (156 F. (2d) 981), and certiorari denied November 18, 1946 (329 U. S. 781), and the term of this Court had expired, Hughes, on July 19, 1947, filed the present action charging infringement of the same four patents listed above in No. 7 (R. 1).

11. On November 3, 1947 Hughes answered interrogatories in the present suit and stated that the devices accused of infringement are Chicago Pneumatic's Types G, K and E bits (R. 71, No. 2).

Thus, there was admittedly a controversy in 1935 when the Type G bit was charged with infringement. There was

admittedly a controversy in 1939 when the Types G and K bits were charged with infringement. There was admittedly a controversy in 1942 ("lawyer's chess" at least) when the Types G, K and E bits were charged with infringement. There was admittedly a controversy in 1947 when suit was filed in Oklahoma charging infringement of the Types G, K and E bits.

If there was no controversy in 1944 it was only because the controversy was ended by Hughes' renunciation. Hughes' unequivocal renunciation in 1944 was obviously designed to avoid a test of its patents outside the Tenth Circuit, and with the intent of suing in the Tenth Circuit as soon as possible.

Hughes' brief in opposition to this petition professes ignorance as to the scheme which Hughes devised to circumvent the letter and spirit of the Declaratory Judgment Act and the decisions of the courts. The scheme enabled Hughes to have a declaratory judgment suit dismissed on the assertion that no actual controversy existed (R. 29) and then to bring a later suit to determine exactly the same issues while asserting that an actual controversy had in fact existed in the period before and during the pendency of the declaratory judgment suit (R. 71, No. 2). The obvious inconsistency of Hughes' assertions condemns the scheme.

* * * * * *

Hughes asserts in its brief that validity and infringement of patents involved in sales to the Government could not have been adjudicated in the first Delaware case (No. 463). Of course that case did not depend on sales to the Government, but Hughes is apparently wrong on the law. In *Western Electric Co.* v. *Hammond,* 135 F. (2d) 283 (C. C. A. 1, 1943) the Court permitted an alleged patent infringer (Western Electric) to maintain a declaratory judg-

ment suit to determine whether its sales to the Government were made under license from the patent owner despite the fact that suit for infringement could not be maintained against it, and suit for patent infringement had already been filed by Hammond in the Court of Claims. The reason, as stated on page 289, was that such a suit would remove a cloud on Western Electric's right to manufacture apparatus for the United States without risk to the Government.

The *Western Electric* case was cited and discussed with approval by the Court of Appeals for the Third Circuit in *Aralac, Inc.* v. *Hat Corporation of America,* 166 F. (2d) 286 (1948).

The Fletcher Patent 1,856,627.

The Fletcher patent involved in this suit is the one which was withdrawn in the *Robertson Rock Bit* case before the Fifth Circuit Court of Appeals. That patent is the subject of litigation in the Tenth Circuit in at least six other cases now pending, all of which are cited in our main brief.

The present case involves the same four patents which were involved in the *Robertson Rock Bit* case, which case is now awaiting decision of this Court in the case of *Robertson Rock Bit Company, Inc.* v. *Hughes Tool Company,* October Term, 1949, No. 486, on petition for rehearing of denial of certiorari. Two of the four patents, including Fletcher 1,856,627, are now before the Tenth Circuit Court of Appeals in the case of *Williams* v. *Hughes Tool Company,* on appeal from the decision of Judge VAUGHT (W. D., Okla.) at 82 F. Supp. 408, in which the Government has filed a brief as *amicus curiae* on behalf of *C. F. Williams,* charging Hughes with misuse of patents. The Court has

announced through its Clerk that it has decided to hold them valid but not infringed by a "retipper", but has referred the case to all five judges on the issue of whether retipping was proper under Hughes' "lease" arrangements.

Respectfully submitted,

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Of Counsel.

New York, N. Y.,
August 3, 1950.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 113

CHICAGO PNEUMATIC TOOL COMPANY,
Petitioner,

vs.

HUGHES TOOL COMPANY,
Respondent.

Affidavit of Raymond G. Mullee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RAYMOND G. MULLEE, being first duly sworn, deposes and says:

I am an attorney at law, admitted to practice in the highest Court of the State of New York, with an office at 8 E. 44th Street, New York 17, N. Y., and am of counsel for petitioner in this proceeding.

I was of counsel for the plaintiffs in the case of *Chicago Pneumatic Tool Company, a corporation of New Jersey* and *Chicago Pneumatic Tool Company, a corporation of Massachusetts,* plaintiffs vs. *Hughes Tool Company,* de-

fendant, in the District Court of the United States for the District of Delaware, Civil Action No. 463.

The complaint in said Civil Action No. 463 contained three counts, the first two of which were dropped on appeal in that case.

In said Civil Action No. 463 a motion was filed by Hughes Tool Company of which only the latter part related to count 3 of the complaint in that action. That portion of said motion relating to said count 3 is correctly reproduced on the following pages. Paragraph 3 of said motion refers to the Anti-Trust laws. The only mention of the Anti-Trust laws in count 3 was in paragraph 34 (R. 184) alleging jurisdiction. No relief under the Anti-Trust laws was asked in count 3 (R. 191-2).

RAYMOND G. MULLEE

Sworn to and subscribed before me this 3rd day of August, 1950.

EILEEN LAMERSON
Notary Public

(NOTARY'S SEAL)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

CHICAGO PNEUMATIC TOOL COMPANY, a corporation of New Jersey, and CHICAGO PNEUMATIC TOOL COMPANY, a corporation of Massachusetts, *Plaintiffs,* *vs.* HUGHES TOOL COMPANY, *Defendant.*	CIVIL ACTION No. 463

Motion of Defendant to Strike, to Dismiss and for Summary Judgment.

* * * * * * * * * *

In respect to Count Three of the complaint, the defendant makes the motions following:

1. To strike the same because of its failure to apply with Rule 8(e) of the Federal Rules of Civil Procedure in that the said Count is not simple, concise and direct, as provided under Paragraph 1 of Rule 8(e).

2. To strike the same (and particularly Paragraphs 44 and 45 thereof) because redundant, immaterial, impertinent and scandalous. This motion is grounded upon Rule 12(f) of the Federal Rules of Civil Procedure.

3. To dismiss the same under Rule 12(b) of the Federal Rules of Civil Procedure because it fails to state a claim under the Anti-Trust Laws, Title 15 U. S. C., Sections 2, 15 and 26, or, in the alternative, to strike all references to said Anti-Trust Laws from said Count.

4. To dismiss because there is no actual controversy of a substantial character, as required by the Declaratory Judgment Act (28 U. S. C. 400).

5. To dismiss because the said complaint is not filed in good faith and is brought by plaintiffs with unclean hands.

6. To dismiss because under its discretionary power the Court should not entertain it.

In respect to the foregoing motions to dismiss, the defendant will refer to the record, the opinions and briefs in said suit of *Hughes Tool Company* v. *Chicago Pneumatic Tool Company,* and to the affidavit of Jesse R. Stone, which is filed herewith.

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/s/ Robert F. Campbell

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/s/ George I. Haight

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AUG 4 1950
CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

RESORT AIRLINES, INC., *Intervener.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

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_____, 1950.

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INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Summary Statement of Matter Involved	3
Reasons for Granting Writ	6
Argument and Brief	7
1. The issuance of a writ of certiorari is necessary to resolve a fundamental conflict between the power of Congress over foreign commerce and the power of the President over foreign affairs	7
2. The Court of Appeals for the District of Columbia Circuit has misinterpreted and misapplied the decision of the Supreme Court in the Waterman Case	8
3. The action of the Court of Appeals for the District of Columbia Circuit denying judicial review compels the conclusion that the delegation of Congressional power to the President in the Civil Aeronautics Act is unconstitutional. As such, the action of the Court is inconsistent with a decision by a three-judge statutory court in the same Circuit	13
4. In the Waterman Case the Solicitor General conceded that judicial review might be had under circumstances analogous to those presented here	14
Conclusion	18
Addendum	19
Appendix to Brief	23

Page

TABLE OF CASES CITED.

Chicago & Southern Air Lines v. C.A.B., App. D. C. No. 10375, May 8, 1950 21
Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U. S. 103 (1948) 2, 5, 6, 8, 10, 11
Colonial Airlines v. Adams, et al., 87 Fed. Supp. 242 (1949) 6, 13, 14
Perkins v. Elg, 307 U. S. 325 (1939) 17
Seaboard & Western Airlines, Inc. v. C. A. B., 181 F. (2d) 777 (1949) 16
Seaboard & Western Airlines, Inc., et al. v. Ryan, et al., U. S. D. C., D. C. No. 2989-50 (July 1950) 17
Sparks et al. v. C. A. B., App., 2nd Cir., No. 21728 (filed July 1950) 20
Trans-World Airlines v. C. A. B., App., 2nd Cir., No. — (filed July 1950) 20

MISCELLANEOUS CITATIONS.

47 Columbia Law Review 1081 (1947) 11
61 Harvard Law Review 1053 (1948) 11
43 Illinois Law Review 693 (1948) 11
15 Journal of Air Law 474 (1948) 11
17 Journal Bar Ass'n, Kansas 241 (1948) 11
32 Minnesota Law Review 811 (1948) 11

STATUTES CITED.

Civil Aeronautics Act, Section 401 (49 U. S. C. 481) 3, 4, 7, 12, 15
Civil Aeronautics Act, Section 402 (49 U. S. C. 482).. 13
Civil Aeronautics Act, Section 801 (49 U. S. C. 601) 3, 7, 9, 10, 12, 17, 18
Civil Aeronautics Act, Section 1006 (49 U. S. C. 646) 4, 5

INDEX TO STATUTES IN APPENDIX.

Civil Aeronautics Act, Section 401 (52 Stat. 987, 49 U. S. C. 481) 23
Civil Aeronautics Act, Section 801 (52 Stat. 1014, 49 U. S. C. 601) 23
Civil Aeronautics Act, Section 1006 (52 Stat. 1024, 49 U. S. C. 646) 23

IN THE

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OCTOBER TERM, 1950

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v.

CIVIL AERONAUTICS BOARD, *Respondent,*
RESORT AIRLINES, INC., *Intervener.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WITH SUPPORTING BRIEF.

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Chicago and Southern Air Lines, the petitioner below, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 8, 1950, in so far as said order dismissed the petition for review and denied judicial review of the contentions advanced by petitioner in Points 4 and 5 of its petition for review (R. 47-49).[1]

[1] Petitioner accepts the order in so far as it denied judicial review of the other contentions advanced by petitioner in Points 1, 2, 3 and 6 of its petition for review.

OPINIONS BELOW.

The decision of the Civil Aeronautics Board which petitioner sought to review in the United States Court of Appeals for the District of Columbia Circuit is set forth at pages 36-43 of the record. The per curiam order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review is set forth at pages 71-72 of the record and was not accompanied by any opinion.

JURISDICTION.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit was entered on May 8, 1950 (R. 72). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutory provisions are cited in Appendix A, *infra*, pages 23-24.

QUESTION PRESENTED.

This case presents a single question: whether the holding of this Court in the case of *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) that the issuance of a certificate of public convenience and necessity by the Civil Aeronautics Board in the field of foreign air transportation is immune from judicial review once Presidential approval thereto had been given, extends to a situation where in the issuance of such a certificate the Board and the President have transgressed the express provisions of the Civil Aeronautics Act and ignored the statutory scheme established by Congress in that Act.[2]

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[2] Hereinafter the Civil Aeronautics Act will be referred to as the "Act."

SUMMARY STATEMENT OF MATTER INVOLVED.

The intervener, Resort Airlines, Inc., applied to the Civil Aeronautics Board for a certificate of public convenience and necessity authorizing it to engage in a limited and specialized form of air transportation generally described as sky cruises and designed to exploit vacation or pleasure travel through the medium of all-expense air tours. The application of Resort was consolidated for hearing with a similar application filed by American Air Export and Import Company (hereinafter referred to as AAXICO) and assigned for hearing before an Examiner of the Board on October 29, 1947. Various existing certificated air carriers, including petitioner, were permitted to intervene in opposition. Hearings were held and the Examiner's Report was issued on August 19, 1948, recommending the issuance of a certificate to Resort. (R. 11-12) After receiving briefs and hearing oral argument, the Board on January 31, 1949, adopted an opinion and order (R. 22-35), in which it found that the applications of Resort and AAXICO were not required by public convenience and necessity and should be denied in their entirety. Having concluded that public convenience and necessity did not require the air transportation proposed by Resort and AAXICO, the Board made no finding as to whether either Resort or AAXICO was fit, willing or able to render such transportation within the meaning of Section 401(d)(1) of the Act (52 Stat. 987, 49 U. S. C. 481).

Inasmuch as these applications included requests to engage in overseas and foreign air transportation, the Board on February 1, 1949, in accordance with Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601) submitted its decision to the President for approval. Thereafter, the President advised the Board that "for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas air transportation substantially in accord

with the recommendation of the Examiner." (R. 41) The record does not indicate on what possible basis the operation of all-expense air tours could be considered as "affecting our relations with foreign countries" or as being "in the interest of our national security." However, on June 1, 1949 the Board complied with the President's direction and issued an opinion and order granting Resort a temporary certificate of public convenience and necessity authorizing it to engage in foreign and overseas air transportation limited to all-expense tours between certain points in the United States and certain points in foreign countries and United States possessions, including points already being served by petitioner (R. 42-43). The opinion and order of the Board contained no finding as to the "fitness, willingness and ability" of Resort as required by Section 401(d)(1) of the Act. This order was approved by the President on June 9, 1949. (R. 43)

On August 8, 1949, petitioner filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 1006(a) of the Act (52 Stat. 1024, 49 U. S. C. 646). (R. 45-61). Resort was permitted to intervene. (R. 61) In the petition for review, petitioner contended that the President had exceeded the authority delegated to him by Congress under Section 801 of the Act in two respects: (1) in specifying the particular carrier to render the air transportation which he considered to be in the national interest, and (2) in designating such carrier without the benefit of a finding by the Board as to the "fitness, willingness and ability" of that carrier to render such air transportation. Petitioner further contended that the Board has failed to comply with its statutory duty in not making any finding as to the "fitness, willingness and ability" of Resort before issuing the certificate to Resort as directed by the President (R. 47-49). On October 20, 1949 respondent, Civil Aeronautics Board, moved to dismiss the petition for review or, in the alternative, to affirm the Board's order forthwith (R. 61-63). Re-

spondent urged in its motion to dismiss that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) completely immunized from judicial review the contentions advanced by petitioner in its petition for review. On November 19, 1949, the intervener, Resort Airlines, also moved to dismiss the petition for review (R. 63-65).[3] On January 18, 1950, the United States Court of Appeals for the District of Columbia entered a per curiam order granting respondent's motion to dismiss and dismissing the petition for review (R. 65-66). The per curiam order was not accompanied by any opinion and assigned no reasons for the action taken. On January 26, 1950, petitioner filed a petition for rehearing and reconsideration or for clarification (R. 66-70). On May 8, 1950, the Court of Appeals denied the petition for rehearing and reconsideration but amended its order of January 18, 1950 to indicate that its action in granting respondent's motion to dismiss and in

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[3] The intervener also moved to dismiss on the ground that although the petition for review had been filed within 60 days of the date of the President's approval of the Board's order, it had not been filed within 60 days after the "entry" of the order by the Board as required by Section 1006(a) of the Act, and for the further reason that petitioner had not urged before the Board its objections as to invalid exercise of power by the President and the Board as required by Section 1006(e) of the Act. The respondent joined in the latter objection. Neither of these objections was considered by the court below (R. 72). However, the respondent and intervener may seek to reassert these objections in answer to this petition. In the court below, petitioner answered these objections by showing: (1) that since the Board is prohibited under Section 801 from publishing its final order until Presidential approval has been obtained, the 60-day appeal period cannot begin to run until Presidential approval has attached; (2) that until the President and the Board had finally acted, petitioner could not have objected to their invalid exercise of power and failure to comply with the statutory scheme and that thereafter petitioner's only recourse was to seek judicial review; and (3) that in any event, in the unusual circumstances prevailing here, petitioner had "reasonable grounds" within the meaning of Sections 1006(a) and 1006(e) of the Act for failure to comply with the precise requirements of these sections.

dismissing the petition for review was based upon *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra.* (R. 72)

REASONS FOR GRANTING THE WRIT.

1. The order of the United States Court of Appeals for the District of Columbia Circuit in denying judicial review of alleged invalid exercise by the President of delegated Congressional power creates a fundamental conflict between the constitutional power of Congress over foreign commerce and the constitutional power of the President over foreign affairs, which conflict can only be resolved by the issuance of a writ of certiorari and a decision by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has misinterpreted the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* and has erroneously extended the immunity from judicial review granted by that decision to a situation not contemplated and, in fact, inferentially excepted in that case.

3. The order of the United States Court of Appeals for the District of Columbia Circuit granting the motion to dismiss renders unconstitutional the delegation of Congressional power to the President in the Civil Aeronautics Act and, to that extent, is in conflict with the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.,* 87 Fed. Supp. 242 (1949).

4. The order of the United States Court of Appeals for the District of Columbia Circuit dismissing the petition for review has decided questions of general importance and substance relating to the construction and application of the Civil Aeronautics Act not heretofore decided by this Court, such questions including:

a. Whether the Board may ignore precise statutory requirements established by Congress and be immune from judicial review?

b. Whether the President in exercising delegated Congressional power may ignore the standards established by Congress and be immune from judicial review?

c. Whether the President may exercise power in excess of that delegated to him by Congress and be immune from judicial review?

ARGUMENT AND BRIEF.

1. The issuance of a writ of certiorari is necessary to resolve a fundamental conflict between the power of Congress over foreign commerce and the power of the President over foreign affairs.

The Civil Aeronautics Act of 1938 represents a comprehensive scheme for the regulation of air transportation and was enacted by Congress in the exercise of its constitutional power over foreign and domestic commerce. The Act provides that no one may engage in air transportation unless possessed of a certificate of public convenience and necessity issued by the Board, and further provides that the Board may not issue any such certificate unless it makes the requisite statutory findings of public convenience and necessity and of fitness, willingness and ability as set forth in Section 401 of the Act. Congress recognized the necessity of coordinating its power over foreign commerce with the President's constitutional power over foreign affairs. Accordingly, in Section 801 of the Act it delegated to the President a portion of its constitutional power and subjected to Presidential approval the issuance or denial of all certificates authorizing foreign air transportation. So much is clear from the Act itself. However, it does not follow from this that the Board and the President may ignore the statutory scheme established by Congress in matters affecting foreign air transportation. Nor

does it follow that judicial review is not available to determine whether in fact the Board and the President have ignored the statutory scheme. If judicial review is not available, then the President may resolve in his own favor any conflict between his power over foreign affairs and Congress' power over foreign air commerce, and the Board instead of being the creature of Congress to carry out its policy and purpose as set forth in the Act becomes the agency of the Executive. The issuance of the writ requested here is the first step leading to the ultimate determination of these important questions. Without the writ, the question of judicial reviewability is foreclosed. Without judicial review, the resolution of the conflict between Congressional and Presidential power is foreclosed.

2. The Court of Appeals for the District of Columbia Circuit has misinterpreted and misapplied the decision of the Supreme Court in the Waterman Case.

It is clear from the order dismissing the petition for review that the Court of Appeals for the District of Columbia Circuit was of the opinion that the decision of this Court in *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation, supra,* completely immunizes from judicial review *any* action by the Civil Aeronautics Board and the President in the issuance of a certificate authorizing a carrier to engage in foreign air transportation. The *Waterman Case* was the only reason cited for dismissing the petition for review.[4] Since the factual situations in the *Waterman Case* and in the instant case are so different, it is imperative that a writ of certiorari issue so that this Court may declare that by its decision in the *Waterman*

[4] The order dismissing the petition for review states that the Court took judicial notice "that H.R. 5771, 80th Cong. 2d Sess., died in Committee." However, the order does not indicate what effect this had upon the court's reasoning, if any. In any event, the fact that a particular piece of legislation was introduced or failed of passage or "died in Committee" is of no legal significance here.

Case it did not intend to immunize from judicial review *any and all action* by the Board and the President in the issuance of a certificate covering foreign air transportation, particularly where the Board and the President have violated the express provisions of the Act or exceeded the power conferred upon them by Congress.

The *Waterman Case* was decided by this Court in 1948 by the narrow margin of a five to four decision. In that case the Civil Aeronautics Board had rendered a decision in which it found: (a) that public convenience and necessity required the certification of a carrier to engage in foreign air transportation in the Caribbean area, and (b) that Chicago and Southern Air Lines was fit, willing and able to engage in such transportation, both of which findings are statutory findings required by Section 401 of the Act. This decision was submitted to the President for approval in accordance with Section 801 of the Act and his approval was obtained. Waterman Airlines, a rival applicant for the routes, petitioned for judicial review and this Court held, when the matter was finally presented to it, that the valid exercise of the President's discretionary power under Section 801 of the Act was immune from judicial review. In that case no question was raised by Waterman as to any failure by the Board to make the requisite statutory findings, nor was any question raised as to the legality of the action of the President in approving the Board's decision. Even so, this Court divided five to four on the question of judicial reviewability.

The instant case presents a different situation. Here the Board and the President exceeded the authority vested in them by Congress under the Act. Here the Board acted illegally in issuing a certificate to Resort without having first made a determination as required by Section 401 of the Act as to the fitness, willingness and ability of Resort to engage in air transportation. Here the President exceeded the power delegated to him by Congress in Section 801 of the Act in specifically directing the Board to issue

a certificate to Resort (instead of leaving it to the Board to determine whether Resort or AAXICO should be certificated to provide the air transportation deemed by the President to be in the national interest) and in directing the Board to issue a certificate to Resort without the benefit of a recommendation from the Board as to the fitness, willingness and ability of Resort to engage in such air transportation. This presents an entirely different situation from that presented in the *Waterman Case.*[5]

The difference between the two cases was apparently anticipated by the majority opinion of this Court in the *Waterman Case.* In one of the opening sentences of his majority opinion in the *Waterman Case,* Mr. Justice Jackson stated as follows:

> "*By proceedings not challenged as to regularity,* the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago & Southern Air Lines, a rival applicant." 333 U. S. 105. (Italics supplied)

This language infers that the majority opinion expressly reserved for a future time the question whether irregularities committed by the Board or the President in the is-

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[5] Petitioner is particularly well aware of these differences inasmuch as petitioner was an active participant in the *Waterman Case.* It was petitioner which carried the *Waterman Case* to this Court and successfully urged upon this Court that the issuance of a certificate of public convenience and necessity in foreign air transportation is immune from judicial review in a situation where the Board complied with the statutory scheme established by Congress in the Act, and where the recommendations made by the Board to the President were approved by him in the valid exercise of his powers under Section 801 of the Act. Petitioner is not now seeking to avoid in this proceeding the rule of law resulting from its successful prosecution of the *Waterman Case.* Petitioner believes that the rule of law established in the *Waterman Case* is the correct one under the factual situation, issues and contentions there involved. The instant proceeding, however, involves a different factual situation and presents different issues.

suance of a certificate involving foreign air transportation are subject to judicial review. In his dissenting opinion, Mr. Justice Douglas (joined in by Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge) stated as follows:

> "Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. *Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.*" 333 U. S. 117 (Italics supplied)

The dissenting Justices undoubtedly anticipated a future case where legal irregularity might be involved and feared that even in such a case judicial review would be denied under the rationale of the majority opinion. It seems reasonable to assume, therefore, that the phrase "by proceedings not challenged as to regularity" was inserted by Mr. Justice Jackson in the majority opinion to lay at rest the misgivings of the four dissenting Justices and to make it perfectly clear that the law of the *Waterman Case* was not as broad in scope as the dissenters feared and that the majority expressly reserved for future decision in an appropriate case the question whether immunity from judicial review attached to invalid exercise of power by the Board and by the President. It is such a case that petitioner now presents.

Since the decision in the *Waterman Case,* there has been considerable debate as to the full scope, meaning and effect of that decision.[6] Does the *Waterman Case* mean that the

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[6] The importance of the decision of the Supreme Court in the *Waterman Case* and the serious questions posed by the decision as to the scope of immunity from judicial review provided therein is evidenced by the large number of legal articles which have been written commenting on this decision and its possible scope, including the following: 61 Harvard Law Review 1053 (1948); 43 Illinois Law Review 693 (1948); 32 Minnesota Law Review 811 (1948); 17 Journal Bar Ass'n., Kansas 241 (1948); 15 Journal of Air Law, Northwestern 474 (1948); 47 Columbia Law Review 1081 (1947).

Board and the President have an absolutely free hand in the award of certificates involving foreign air transportation? Can they ignore the mandatory requirements of the Act as established by Congress? Are there any limits on their immunity from judicial review and, if so, what are these limits? Did this Court in the *Waterman Case* intend that the constitutional power of Congress over foreign commerce should be completely subservient to the President's power over foreign affairs? Did this Court mean that the President in exercising his delegated power over foreign commerce under Section 801 of the Act could ignore the standards prescribed by Congress in Section 401? At present neither the President, the Board nor the air transport industry has any clear understanding on these vital questions. All that can be said with certainty under the *Waterman Case* is that a decision of the Civil Aeronautics Board arrived at after notice and hearing and in full compliance with procedural due process and supported by the necessary statutory findings of (a) public convenience and necessity, and (b) of fitness, willingness and ability, awarding a certificate in foreign air transportation is not subject to judicial review once the decision of the Board has been approved by the President in the valid exercise of his delegated and discretionary power under Section 801. The instant case is the first to come before this Court since the *Waterman Case* which presents a situation where the Board did *not* make the necessary statutory findings and where the President *invalidly* exercised the powers conferred on him by Section 801, and exercised powers in *excess* of those conferred by Section 801.[7]

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[7] As will be shown below, the Government has, until this case arose, consistently construed the *Waterman Case* as not precluding judicial review of failure to comply with statutory requirements of law and procedure.

3. The action of the Court of Appeals for the District of Columbia Circuit denying judicial review compels the conclusion that the delegation of Congressional power to the President in the Civil Aeronautics Act is unconstitutional. As such, the action of the Court is inconsistent with a decision by a three-judge statutory court in the same Circuit.

A further reason for granting the writ of certiorari is provided by the conflict between the order of the court below and the recent decision of the United States District Court for the District of Columbia sitting as a statutory three-judge court in the case of *Colonial Airlines* v. *Adams, et al.*, 87 Fed. Supp. 242 (1949). In the latter case, which involved the constitutionality of Sections 402 and 801 of the Act, the exact meaning and effect of this Court's holding in the *Waterman Case* became important. The constitutional question turned on whether the delegation to the President in Section 801 of the Act of a portion of Congress' power over foreign commerce had been accompanied by adequate standards in Section 402 of the Act.[8] In sustaining the constitutionality of the disputed sections, the majority opinion in the *Colonial Case* held that the standards provided by Section 402, including the standard of "fitness, willingness and ability," were mandatory and not merely permissive, otherwise the delegation by Congress to the President in Section 801 would be unconstitutional. The dissenting opinion, however, interpreted the *Waterman Case* as holding that the President is not bound by the standards imposed by Congress in Section 402, since he may disregard them without fear of judicial review. From this it concluded that Section 402 did not provide suitable standards and was, therefore, unconstitutional.

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[8] Section 402 of the Act relates to the issuance of permits to foreign air carriers and is substantially the same as Section 401 relating to the issuance of certificates to domestic air carriers. Both sections require the Board to find that the carrier seeking the permit or certificate is "fit, willing and able" to engage in the air transportation applied for.

The conflict between the action of the Court of Appeals in the instant case and the decision in the *Colonial Case* is clear. In the instant case the Court of Appeals has extended the *Waterman Case* to hold that judicial review may not be had where the standard of "fitness, willingness and ability" has not been complied with. In the *Colonial Case* the opposite assumption forms the basis of the majority opinion, which holds that compliance with the "fitness, willingness and ability" standard established by Congress is mandatory and that the finding of "fitness, willingness and ability" must be had *before* the President acts. If the Court of Appeals in the instant case is correct, then it follows that the Court in the *Colonial Case* was wrong in basing its finding as to the constitutional issues presented on the mandatory nature of the standards established by Congress.

The intra-circuit conflict resulting from the decision of the Court of Appeals in the instant case and the decision of the statutory three-judge court in the *Colonial Case*[9] can only be resolved by a writ of certiorari by this Court.

4. In the Waterman Case the Solicitor General conceded that judicial review might be had under circumstances analogous to those presented here.

In his Brief to this Court in the *Waterman Case,* the Solicitor General of the United States did not urge that blanket immunity from judicial review extended to all cases involving Presidential approval of certificates in foreign air transportation. He, as well as petitioner, merely contended that immunity from judicial review extended to the valid exercise of the President's discretionary power and this Court so held. The Solicitor General in the *Waterman Case* conceded that an appropriate case might arise where

[9] The *Colonial Case* having been decided by a statutory three-judge court was not subject to review by the Court of Appeals. It was appealed to the Supreme Court but the appeal was ultimately withdrawn. 94 L. Ed. 374 (1950).

judicial review might be had and cited examples startlingly similar to the situation here presented:

> "While the exercise of the President's discretionary power is not subject to judicial review, there remains the question whether any other elements of the joint President-Board action are properly reviewable by the courts.
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> "In Section 401 of the Civil Aeronautics Act, Congress has imposed various conditions precedent to the issuance of certificates of public convenience and necessity. Public notice of the filing of an application for such a certificate must be given by the Board, and the application may be determined only after a public hearing. Section 401 (c). Also, Section 401 (f) contains affirmative and negative requirements as to the terms and conditions to be contained in any certificate, which may be issued under that section. It requires, *inter alia*, that American carrier certificates for foreign air transportation must permit the handling of foreign mail. Again the certificates may not restrict the right of the carrier 'to add to or change schedules'. If Section 1006(a) is construed as evidencing a Congressional purpose to provide for review, so far as practicable, of joint President-Board orders relating to certificates for overseas or foreign air transportation, then these are matters which are capable of judicial scrutiny to ascertain whether there has been compliance with the statutory requirements.
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> "To summarize our views: the President's discretionary powers under Section 801 are not reviewable. Questions as to the adequacy of evidence to support the Board's findings and conclusions do not present reviewable issues. The Board's compliance with such statutory requirements as notice and hearing may be reviewable, together with outright questions of law such as would be involved in the Board's failure to comply with the requirements of Section 401 (f)."
> Government's Brief in *Waterman Case*, pp. 52-53.

The foregoing position has been consistently followed by the Government in every case since the *Waterman Case* until the present one.[10]

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[10] For example, in *Seaboard & Western Airlines, Inc.* v. *C.A.B.*, 181 Fed. (2d) 777 (1949), the Government's Brief to the Court of Appeals for the District of Columbia Circuit construed the decision of this Court in the *Waterman Case*, as follows (p. 15):

> "In the *Waterman* case the Supreme Court held that 'orders of the Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at any time before they are finalized by Presidential approval' and that 'after such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate' (333 U.S. at p. 114). It seems clear, however, that the Court was not passing upon the question whether the Board's compliance with legal and procedural requirements of the statute were subject to review. It put these questions aside at the outset by stating that the orders of the Board arose 'by proceedings not challenged as to regularity' (333 U.S. at p. 105).
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> "Seaboard argues that this language was purely descriptive and has no particular significance. It points to the language of the dissenting opinion which, recognizing that no question of procedural irregularity was before the Court, states that 'tomorrow' such questions may arise and the Board's action will not be subject to correction by the Courts (333 U.S. at p. 118) (Reply to Respondent's Objections to Petition for Stay of Proceedings, filed April 14, 1949, pp. 13-15). It is possible to construe the Court's decision in the *Waterman* case either as refusing to pass upon an issue that was not before it, or as intimating that procedural irregularities in orders approved by the President could not be judicially reviewed. We think that the position of the Board before the Court in the *Waterman* case requires the adoption of the former construction.
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> "Since the Board did not contend that approval of one of its orders by the President insulated such order from review for procedural or legal irregularities, and since the orders before the Court arose 'by proceedings not challenged as to regularity,' as the Court stated, we submit that the *Waterman* case does not purport to determine whether an order of the Board approved by the President may be reviewed in the courts for procedural irregularities. While the *Waterman*

The striking similarity between the argument advanced by the Government in the *Waterman* and *Seaboard Cases* and the argument advanced by petitioner in the instant case is readily apparent. Petitioner here urges nothing more or different than was urged by the Government in the *Waterman Case* as noted above. If the Government is consistent, it will be supporting and not opposing the issuance of the writ requested herein. As recently as July 13, 1950, the Government conceded that an illegal order issued by the Civil Aeronautics Board was subject to review by the courts even though such illegal order had been approved by the President under Section 801:

> "If the Board's original decision could not lawfully be submitted to the President under 49 U.S.C. 601, and, as plaintiffs contend, any subsequent order of the Board would necessarily be illegal, then any such subsequent order would also be outside the exceptions to the judicial review provisions of the Act (49 U.S.C. 646) as interpreted by the *Waterman* case."
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> Government's Supplemental Memorandum in support of motion to dissolve temporary restraining order, *Seaboard & Western Airlines, Inc., et al.* v. *Oswald Ryan, et al., Members of the Civil Aeronautics Board,* Civil Action 2989-50, U. S. District Court, D. C.

The inclusion by Mr. Justice Jackson in his majority opinion in the *Waterman Case* of the phrase "by proceed-

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case does not preclude such review,[10] the cases under the Tariff Acts referred to above would seem to permit it.[11] * * *"

"[10] The situation appears to be that the four dissenting justices in the *Waterman* case would permit such review, and that the five justices representing the majority have not expressed themselves on the question."

"[11] See also, for example, *Perkins* v. *Elg,* 307 U.S. 325, 350 (1939), where the Supreme Court reversed the Secretary of Labor's determination of a legal question as to the citizenship of an applicant for a passport, although it professed to have no power to interfere with the 'discretion' of the Secretary of State to grant or withhold the passport."

ings not challenged as to regularity" undoubtedly indicated his acceptance of the Government's contention that judicial review might be had in a case where legal or procedural irregularities were involved, notwithstanding Presidential approval. Petitioner sought to present such a case in the court below but found itself confronted with the Government no longer maintaining the position it advanced in the *Waterman Case* and instead contending that the procedural and legal irregularities alleged by petitioner are immune from judicial review, citing the *Waterman Case* as authority for this proposition. A writ of certiorari should issue to provide this Court an opportunity to pass upon an important case of first impression, one "challenged as to regularity."

CONCLUSION.

The issues which petitioner has raised in its petition for review are of far-reaching importance. They require judicial definition of the scope of the President's authority under Section 801 of the Civil Aeronautics Act. They require judicial delineation of the constitutional power of Congress over foreign commerce as expressed in the Civil Aeronautics Act and of the President's constitutional power over foreign affairs. They require judicial determination of the extent which the President in purportedly exercising his constitutional power over foreign affairs can usurp, override or disregard the power delegated to the Civil Aeronautics Board by Congress to determine what carriers are fit, willing and able to engage in air transportation. They raise questions as to the constitutionality of Sections 401 and 801 of the Act if the failure by the President and the Board to comply with Congressional standards is not judicially reviewable. The court below has held that the decision of this Court in the *Waterman Case* precludes a determination of any of these issues by the judiciary. The District Court in the same circuit in a decision not subject to review by the court below has held to the contrary.

The importance of air transportation to foreign and domestic commerce, to the national defense and to the Postal Service has been recognized by Congress in Section 2 of the Civil Aeronautics Act. As this Court stated in the *Waterman Case* (333 U. S. 108) air transportation has "burst suddenly upon modern governments offering new advantages, demanding new rights and carrying new threats." For that reason, it is essential that the respective powers of Congress and the President in the development of foreign air transportation be clearly delineated and that the scope of the President's power in approving or disapproving recommended decisions by the Civil Aeronautics Board be clearly defined.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this Cause directed to the United States Court of Appeals for the District of Columbia Circuit and upon such review the order of said Court of Appeals for the District of Columbia Circuit be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed further in accordance with the views of this Court.

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NOTE: Addendum beginning on page 20.

ADDENDUM.

Since the printing of the foregoing portion of this petition, certain matters have arisen which emphasize the importance of this case and the need for a clear definition by this Court of the scope of its decision in the *Waterman Case* and the extent to which judicial review is available to correct invalid exercise of Presidential and Board power. On July 20, 1950, petitions for review and for stay were filed in the United States Court of Appeals for the Second Circuit in two separate actions challenging the legality of various orders issued by the Civil Aeronautics Board and approved by the President in the widely discussed Pan American-American Overseas Merger Case; *Trans-World Airlines* v. *The Civil Aeronautics Board, et al., Civil Action No.* ——— and *Brian O. Sparks, et al* (*employees of American Overseas Airlines*) v. *The Civil Aeronautics Board,* Civil Action No. 21728. In each of these cases the petitioners allege that the orders issued by the Board and approved by the President related to a subject matter which was not subject to Presidential approval under Section 801 of the Act and that the Board should not have submitted to Presidential direction and control in the issuance of such orders. Notwithstanding the fact that counsel for the Government on repeated occasions has taken the position in various courts that the *Waterman Case* would not preclude judicial review of alleged legal or procedural irregularities (*supra,* pp. 15-17), in the objections filed by the Government on July 26, 1950, in the Second Circuit in opposition to the petitions for stay, the Government now contends that the *Waterman Case* precludes judicial review once Presidential approval has attached, even in the case where Presidential review and approval is not authorized by the Act, and to support this contention cites the order of the court below in the instant case:

> "The Petition for a stay and other interlocutory relief should be denied because the order of the Board

(Serial No. E-4410), the effectiveness of which Petitioner seeks to stay, is not within the jurisdiction of this Court to review. The order was entered by the Board at the direction of the President, pursuant to section 801 of the Civil Aeronautics Act, as amended, (49 USC 601). The Supreme Court held in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corporation*, 333 U. S. 103, that orders entered at the direction of the President in this fashion 'embodied Presidential discretion as to political matters beyond the competence of the courts to adjudicate.' (333 U. S. at p. 114.)"

* * * * *

"Only recently, on facts not unlike those at bar, this procedure received the express sanction of the Court of Appeals for the District of Columbia Circuit. *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, App. D. C. No. 10375, petition for review dismissed May 8, 1950. In that case the Board submitted an opinion and order to the President recommending denial of two applications to engage in foreign air transportation. The President advised the Board that he believed such air transportation to be required in the interests of the United States and directed the Board to certificate one of the two applicants. The Board complied with this directive. A competitor of the newly certificated carrier challenged the President's action as being beyond the scope of his authority under section 801 of the Act, and contended that the President should have required the Board to submit a recommendation with respect to the carrier to be authorized to perform the services the President thought desirable. The Court of Appeals granted the Board's motion to dismiss the petition for review 'on the authority of *Chicago and Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103'. It is perfectly clear therefore that the *Waterman* case requires the conclusion that the President has authority, once a case is submitted to him, to direct the Board to take such action with respect to an application as he deems appropriate." (Objections to Petitioner's Motion for Stay, pp. 6, 10-11).

Thus we find that whereas the Government as recently as July 13, 1950, conceded in argument before the District Court for the District of Columbia that an order of the Board issued illegally could be reviewed judicially notwithstanding the *Waterman Case* (*supra*, p. 17), less than two weeks later and on July 26, 1950, in proceedings before the Court of Appeals for the Second Circuit involving the same parties and the same subject-matter, the Government took just the opposite position.

If for no other reason, this Court should issue the writ of certiorari in order to resolve all further doubt as to the scope of its decision in the *Waterman Case*. Legal or procedural irregularities committed by the President or the Board in proceedings involving foreign air transportation are either reviewable by the courts or they are not. No persuasive resolution of the question can be expected short of a final decision by the Supreme Court. Issuance of the writ requested herein will provide that opportunity.

It cannot be predicted at this time what disposition the Court of Appeals for the Second Circuit will make of the cases pending there or whether its action will be in conflict with the order of the Court of Appeals for the District of Columbia Circuit granting the motion to dismiss in the instant case. However, the very existence of these cases in the Second Circuit and the broad and sweeping claims of immunity from judicial review now being made by the Government in reliance upon the *Waterman Case* demonstrate the great public importance of the basic jurisdictional question presented here. The determination of this question is of importance not only to petitioner but also to other important units in the air transport industry subject to governmental regulation.

APPENDIX A.

Statutes Involved.

1. Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. 481):

"(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."

* * * * *

"(d)(1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

2. Section 801 of the Act (52 Stat. 1014, 49 U. S. C. 601):

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. * * *"

3. Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646):

"(a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act,

shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said 60 days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

* * * * *

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: PROVIDED, That no interlocutory relief may be granted except upon at least five days' notice to the Authority."

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so."

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code."

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	14
Appendix	15

CITATIONS

CASES:

Aircraft & Diesel Equipment Corporation v. *Hirsch*, 331 U. S. 752 7

American Power & Light Company v. *Securities & Exchange Commission*, 141 F. 2d 606, affirmed, 329 U. S. 90 ..... 7, 13

Chicago & Southern Air Lines v. *Waterman Steamship Corp.*, 333 U. S. 103 ..... 3, 5, 9, 10, 11, 12, 13

Colonial Airlines, Inc. v. *Adams*, 87 F. Supp. 242, appeal dismissed on motion of appellant, 338 U. S. 947 12

Lichter v. *United States*, 334 U. S. 742 13

Marshall Field & Co. v. *National Labor Relations Board*, 318 U. S. 253 7

Pacific Northwest-Hawaii Service Case, 9 C.A.B. 414 7

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304 13

U. S. ex rel. Knauff v. *Shaughnessy*, 338 U. S. 537 13

STATUTES:

Civil Aeronautics Act, 52 Stat. 973, as amended, 39 U. S. C. 401 *et seq.*:

Sec. 2 12

Sec. 401 ..... 12, 15

Sec. 801 ..... 4, 15

Sec. 1006 ..... 5, 6, 7, 16

MISCELLANEOUS:

Civil Aeronautics Board's Rule of Practice, 14 C. F. R. §285.11 .. 6

83 Cong. Rec. 6726 13

83 Cong. Rec. 6853 13

Hearings, House Committee on Interstate & Foreign Commerce, 75th Cong., 3d Sess., H. R. 9738 13

Hearings, Senate Committee on Commerce, 75th Cong., 3d Sess., S. 3760 13

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 235

CHICAGO & SOUTHERN AIRLINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD and RESORT AIRLINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* order of United States Court of Appeals for the District of Columbia (R. 71-72) and the opinions and orders of the Civil Aeronautics Board (R. 22-35, 36-43) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1950 (R. 71). The petition for a writ of certiorari was filed on August 4, 1950. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

Application was made to the Civil Aeronautics Board by two carriers for certificates of convenience and necessity to conduct overseas air tours. Pursuant to Section 801 of the Civil Aeronautics Act, the Civil Aeronautics Board submitted to the President a decision denying both applications. The President directed that one of the applicants be granted a certificate and the Board adopted an order complying with this directive, which the President approved. The questions presented are:

1. Whether petitioner is barred from attacking the President's action as exceeding statutory authority or as being unconstitutional because petitioner failed to raise these issues before the Civil Aeronautics Board.

2. Whether the action taken in this case failed to comply with the Civil Aeronautics Act by reason of the fact that the President designated the carrier to be certificated or by reason of the fact that the Board did not make a finding as to the fitness of the carrier certificated.

3. Whether, under the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, the President's decision in this case is judicially reviewable.

4. Whether the statute as here applied is constitutional.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, are set forth in the Appendix, *infra*, pp. 15-16.

STATEMENT

Resort Airlines, Inc. and American Air Export and Import Company filed applications before the Civil Aeronautics Board pursuant to Section 401 of the Civil Aeronautics Act for authority to engage in aerial all-expense tours and the applications were heard upon a common record. Petitioner and thirteen other certificated air carriers were granted leave to intervene in this proceeding and actively participated therein. After hearings before an Examiner, he issued a report recommending that the Board grant tc Resort certain certificates of public convenience and necessity (R. 11). In such report the Examiner found that Resort is "fit, willing, and able properly to perform the air transportation service recommended" (R. 12). Subsequently the Board adopted but did not publish an opinion and proposed order finding that public convenience and necessity did not re-

quire the air transportation proposed, and that both applications should be denied (R. 22-34). In view of this proposed disposition of the applications it was unnecessary for the Board to pass upon the fitness and ability of the respective applicants, and no findings thereon were made.

Pursuant to the provisions of Section 801 of the Act (*infra,* pp. 15-16), the Board submitted its opinion containing its findings, conclusions and decision to the President for approval (R. 42). The President subsequently advised the Board that for reasons affecting our relations with foreign countries and in the interest of our national security, it is desirable and proper that Resort Airlines, Inc. be granted temporary authority to engage in foreign and overseas transportation substantially in accord with the recommendation of the Examiner (R. 41). Pursuant to this Presidential directive, the Board on June 1, 1949, adopted an opinion, subsequently approved by the President on June 9, 1949, setting forth the President's action, and issued an order granting a temporary certificate of public convenience and necessity to Resort authorizing the tours (R. 36, 42, 43). The certificate provided that it was to become effective within 60 days after the date of its approval by the President unless prior thereto the Board extended such effective date on its own initiative or upon the filing of a petition for reconsideration of its order (R. 45). Petitioner did not file a petition for re-

consideration although such petitions were filed by several other party intervenors. The Board denied these petitions on August 4, 1949, and the certificate issued to Resort became effective on August 8, 1949, sixty days after the President's approval thereof (R. 59-61).

Petitioner on August 8, 1949, filed a petition for review based upon Section 1006 of the Act (49 U. S. C. 646) seeking review of the Board's order of June 1, 1949 (R. 45). Respondent moved to dismiss the petition for review upon the ground that the Board's order is not subject to judicial review on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103, or in the alternative to dismiss the petition for want of jurisdiction as to four of the grounds upon which it attacked the order and to affirm the order forthwith as to the other two grounds of attack for the reason that they were clearly without merit (R. 61-63). The court of appeals entered a *per curiam* order dismissing the petition (R. 65-66). On petitioner's motion for reconsideration or for clarification (R. 66), the court entered a clarifying *per curiam* order dismissing the petition on the authority of *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U. S. 103 (R. 71-72).